assumption that the act specifically covers every case that may arise should not be pressed too far; but that such an obvious gap was left in its provisions on a subject with which in this section it unquestionably undertook to deal, is not a conclusion to be readily accepted.

On the other hand the opposite conclusion is not free from difficulty. If the framers of the act, or the legislatures which adopted it, intended to change a rule of the common law so well established as that now under consideration, their purpose could easily have been expressed more clearly; and it is somewhat significant that in the vigorous criticism to which the draft of the act was subjected by at least one eminent authority before its general adoption, and the equally vigorous defense, this point passed wholly without comment.[11]

The fact seems to be that the framers of the act, intentionally or otherwise, rather dodged the question, by language open to two constructions neither of which is wholly convincing, and that the Massachusetts and Tennessee courts, intentionally or otherwise, have seized the opportunity thus afforded to substitute a more rational rule for one which had ceased to be in harmony with present day conditions and common sense. The law sometimes improves by inadvertence, and this may be such a case.

MISREPRESENTATION BY SILENCE

Is the seller of chattels who knows that the subject-matter of the sale is materially defective, and who nevertheless sells to a buyer who purchases in belief that the goods are what they appear to be—the defect being latent—guilty of misrepresentation or "fraud," so that the buyer may sue in tort for deceit or at least "rescind the contract"? This problem is presented by the recent case of *Salmonson v. Horswill* (1917, So. Dak.) 164 N. W. 973, in which the defendant, when sued for the purchase price of a span of mules, set up as a defense the "fraud and deceit" of the plaintiff and that "on discovering such fraud she rescinded the contract." At the trial the evidence showed that the plaintiff expressly refused to warrant the mules as sound and that, "when inquiry was made of him in relation to the physical condition of the mules, he not only refused to express any opinion thereon, but told defendant that she might try the mules and ascertain their condition," which the defendant did. The trial court also found that "at least one of the mules was to the knowledge of the plaintiff, afflicted with a disease known as the heaves, and that the disease in question

[11] See articles by James Barr Ames in (1900, 1901) 14 HARV. L. REV. 241, 442; (1903) 16 *ibid.* 255; by Lyman Denison Brewster in (1900) 10 YALE LAW JOURNAL 84; (1901) 15 HARV. L. REV. 26; by Charles L. McKeehan in (1902) 41 AM. L. REG. (N. S.) 437, 499, 561.

was "latent in its nature." Upon these facts the Supreme Court of South Dakota affirmed a judgment for the defendant, on the ground that "if a party conceals a fact material to the transaction, and peculiarly within his own knowledge, knowing that the other party acts upon the presumption that no such fact exists, it is as much of a fraud as if the existence of such fact were expressly denied, or the reverse of it expressly stated."

At the outset it must be noted that a full discussion of the problem of silence or omission to speak requires a consideration of its effect: (1) in actions at law for breach of contract; (2) in actions in equity for specific performance; (3) in actions at law for deceit; (4) in actions relating to the privilege and power of "self-help," i. e., the recovery of the article delivered without the aid of judicial proceedings; (5) in actions at law for restitution, which may be either (a) actions to recover the specific article or (b) actions to recover the value of the articles (general assumpsit or trover); or (6) in actions in equity for recovery of the specific article. It is entirely possible and not infrequently the case that facts which entitle a person to one form of relief are not enough to give him a right to others. For example, in a jurisdiction which follows the rule established in *Derry v. Peek*,[1] an innocent misrepresentation will not give rise to an action of tort for deceit, but may without inconsistency be held to be a ground for refusing specific performance or for granting specific restitution either at law or in equity.

The present discussion will be devoted chiefly to a consideration of omissions to disclose so-called latent defects in articles sold, so far as such omission relates to the common law action for deceit or to defenses to common law actions for breach of contract—the latter being the situation presented in the principal case. *Omission* here is used in the sense of an intentional omission to disclose and therefore implies that the one "omitting" knew of the fact not revealed. "Latent" signifies that the defect was one which ordinary diligence in inspecting the article would fail to reveal.

It is well settled in a number of jurisdictions that the intentional omission of the seller of a chattel to disclose a latent and material defect known to him and unknown to the buyer will give the latter, if he buys believing the object to be what it appears to be, either an action for deceit or a defense to an action for the purchase price. In one of the cases usually cited for this proposition this is put on the ground that "in every such case the very sale is equivalent to a representation that the thing is, as far as the vendor knows, what it appears to be, and does impose upon the vendor the duty of correcting any such delusion into which he has led the vendee by offering to sell him for a valuable price, what he knows or believes to be, and which is really valueless, or

[1] (1889, H. of L.) 14 App. Cas. 337.

of essentially different and less value than it appears to be and is taken to be by the vendee, and without which belief he would not have made the purchase, and this well known to the vendor."[2] In the very case, however, in which these words were uttered, a careful reading of the facts will disclose that the defendant was not merely silent but made certain statements concerning the article without telling the whole truth. In cases of this kind, the half truth uttered may be—as it was in the case from which the above quotation is taken,—the plainest kind of misrepresentation, i. e., omission of part makes the residue false.[3] Many others of the cases which are supposed to establish the rule stated above will be found to involve similar situations. When all these have been eliminated, however, there will be found to remain a residuum of authority in this country in favor of the rule as stated.

The case in Vermont above referred to relied upon the English case of *Hill v. Gray*,[4] decided by Lord Ellenborough—a decision which, while never specifically overruled, is now very generally regarded as wrongly decided on its facts.[5] Apparently the English law is not that laid down in *Hill v. Gray*, but just the contrary, and some American authorities agree with the English view.[6] To sustain an action of tort for deceit we must of course find a misrepresentation of some existing fact or thing, or of a past event. It seems clear that to remain silent where according to ordinary business usage disclosure would be made, may well be held to be a misrepresentation. This is, to be sure, a vague test and business standards have undoubtedly changed for the better, or at least there is a growing tendency on the part of many courts to treat non-disclosure in such situations as misrepresentation. Frequently, moreover, one may fairly say that under the circumstances of the particular case silence amounts to a representation that the seller has no knowledge or belief as to the existence or non-existence of the fact in question, i. e., the misrepresentation is as to the seller's state of mind.[7] In the principal case it is, however, even on this basis not easy to find in fact a misrepresentation, for the seller expressly refused to warrant the property and when asked about the physical condition of

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[2] Per Redfield, C.J., in *Paddock v. Strobridge* (1857) 29 Vt. 470.

[3] This is well put by Tennyson:

"A lie which is half the truth is ever the blackest of lies,
For a lie which is all a lie may be met and fought with outright,
But a lie which is part of truth is a harder matter to fight."

[4] (1816, N. P.) 1 Starkie, 434.

[5] See remarks of Jervis, C.J., in *Keates v. Earl of Cadogan* (1851) 10 C. B. 591, 600, and of Lord Chelmsford, L.C., in *Peek v. Gurney* (1873) L. R. 6 H. L. 377, 390.

[6] *Ward v. Hobbs* (1877, C. A.) 3 Q. B. D. 150, s. c. on appeal (1878, H. of L.) 4 App. Cas. 13; *Morris v. Thompson* (1877) 85 Ill. 16.

[7] This is not always noticed in discussions of cases involving statements of so-called "opinion" and "statements of law." Here very frequently there is a misrepresentation as to the speaker's state of mind.

the mules refused to make any statement and told the buyer to investigate for herself, which she in fact did. It may perhaps be argued that in spite of this the seller by his silence impliedly represented that so far as he knew or believed there were no material defects of the kind which actually existed. If so, there was an intentional misrepresentation by the plaintiff of his own state of mind which, if relied upon by the buyer to his damage, would give rise to an action of deceit.[8]

The decision in the principal case, however, may be supported without accepting the view of the court that there was in fact a misrepresentation. It is held by some courts that even though in a particular case there is no misrepresentation and an action for deceit cannot be supported, there may nevertheless be sufficient "fraud" to permit "rescission," i. e., to furnish a defense to an action for the purchase price. Thus it is held by some courts that a mere promise to pay for goods purchased is not a representation that the promisor honestly intends to keep his promise, and that therefore an action for deceit cannot be sustained merely by proof that the promisor intended all the time never to pay for the goods.[9] The same courts hold, however, that the dishonest intention of the buyer in such a case is a sufficient ground for "rescission."[10] In such cases, therefore, the "rescission" is not based upon misrepresentation, but upon dishonesty which falls short of it. Similarly in the principal case the dishonesty of the seller—for dishonesty it clearly is—may, in spite of the fact that we conclude that under the circumstances silence was not in fact a misrepresentation, be held to afford a basis for restoring the *status quo*. We may be willing to do that and yet be unwilling to hold the dishonest seller liable for all damages which the buyer may incur by reason of the error which the seller has dishonestly permitted him to make. We must of course beware of setting up moral standards too far in advance of those prevailing among the members of the business community. We must also be careful not to protect one who has, upon a fair construction of the bargain, assumed the risk of things being as he believes them to be and who wishes to be relieved of a bad bargain upon discovery that his judgment was not as good as he thought it to be.[11]

W. W. C.

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[8] In *Ward v. Hobbs* (1878, H. of L.) 4 App. Cas. 13, the Lord Chancellor (Earl Cairns), in an action for damages based on facts very much like those in the principal case, held that there was no such "implied representation," although expressly recognizing that a representation of the kind alleged would be actionable if made.

[9] *Donovan v. Clifford* (1917) 225 Mass. 435, 114 N. E. 681.

[10] *Watson v. Silsby* (1896) 166 Mass. 57, 43 N. E. 1117; *Phinney v. Friedman* (1916) 224 Mass. 531, 113 N. E. 285.

[11] For a discussion of the whole question from the point of view of "assumption of risk," see the dissenting opinion of Holmes, J., in *Nash v. Minn. Title Ins. Co.* (1895) 163 Mass. 574, 40 N. E. 1039.